trespassers", but they were also "to inspect passing trains, (both interstate and intrastate,) for hot boxes and other defects, and observe the tracks for broken rails and obstructions."

In addition to those duties enumerated by the Supreme Court of Illinois Stoll testified that a part of his duties were "to protect company property and lives of passengers on trains moving over those tracks" (R. 11). It is apparent that Stoll's duties were of the utmost importance to the safety of interstate commerce; yet page 5 of the answer says that his duties "cannot be said to be the furtherance of interstate commerce or directly or closely or substantially affecting such commerce." The mere statement of respondent's argument shows its absurdity. It is difficult to imagine duties of any other employees which could be more essential to or would more "directly, closely and substantially" affect interstate commerce.

With respect to whether Stoll's duties were in interstate commerce, respondent's attorneys argue that an employee is not under the Act if his duties are solely those of a patrolman. Respondent ignores the case of *Missouri Pacific R. R. Co.* v. *David*, 284 U. S. 460, cited on page 23 of our petition, the case of *Wheelock* v. *Industrial Commission*, 318 Ill. 537, cited on page 24 of our petition, as well as the cases from various other jurisdictions cited on page 30 of our petition, all holding that a patrolman comes under the Federal Employers' Liability Act. The only authority relied on by respondent for his argument that policemen do not come under the Federal Employers' Liability Act are two Alabama cases. Both of these cases were decided prior to the case of *Nichols* v. *St. L. & S. F. R. Co.*, 151 So. 347 (Ala.), cited on page 30 of our petition, and both of these cases are

discussed in the *Nichols* case, one of them being distinguished and the other in effect overruled.

In the *Nichols* case a railroad yard policeman was shot while attempting to arrest a person who broke into a freight car of a train containing interstate cars. The Supreme Court of Alabama held that the policeman's duties brought him under the Federal Employers' Liability Act and that therefore he could not recover under the state Workmen's Compensation statute. The *Nichols* case cites as one authority the quotation from Roberts Federal Liabilities of Carriers contained on pages 28 and 29 of our petition for certiorari and also the decisions cited in the notes to that text (including several Illinois Supreme Court cases). The *Nichols* case also relies on the following cases as authority: *Missouri Pacific R. R. Co.* v. *David,* 284 U. S. 460 (discussed on page 23 of our petition); *Philadelphia, B. & W. R. Co.* v. *Smith,* 250 U. S. 101, where it was held that a cook on a camp car furnishing workmen bed and board while working on an interstate railway was engaged in interstate commerce; *St. L. S. F. & T. Ry. Co.* v. *Seale,* 229 U. S. 156, where a yard clerk whose duty it was to take the number of and seal up and label cars, some of which were engaged in interstate and some in intrastate traffic, was held to be directly engaged in interstate commerce; and *Delaware, L. & W. R. Co.* v. *Busse,* 263 Fed. 516, where the holding was that a watchman on a pier used for interstate commerce was engaged in such commerce. Thus, in Alabama (the only jurisdiction cited by respondent as holding that policemen do not come under the Federal Employers' Liability Act) the latest decision of the Supreme Court of that state holds that such employment *does* bring the employee under the Federal Act.

In another respect the conclusion in the *Nichols* case is applicable to the case at bar. There, in answer to

a similar "sympathy" argument, the court points out that while the facts before it might present a hard case, "hardships make shipwrecks of the law", and that although the court might be in entire accord with the humane spirit of the compensation statute, yet it could not extend it beyond its legitimate scope; that if the work was interstate in character the federal statute was supreme and would have to control; and that therefore there could be no recovery.

While respondent argues that his police duties were not enough to bring him under the Act, he completely ignores the question of whether his other duties were such as to bring him under the Act. He thereby impliedly admits the contention in our petition for certiorari and authorities there cited that such duties did bring him under the Act.

III.

As to whether the plain and unambiguous language of the 1939 amendment can be given effect without rendering the act unconstitutional, respondent cites as his authority a quotation from the opinion of the Supreme Court of Illinois in the very case which we are asking this Court to review. The unsoundness of the reasoning of the Supreme Court of Illinois in this case has been demonstrated in our petition for writ of certiorari, and it therefore is not necessary to reiterate what we there said. Respondent's only other attempt to argue that the amendment is unconstitutional is by a further quotation from *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1. On page 22 of our petition we have pointed out that actually this case supports the validity of the 1939 amendment, and on that page of our petition we have quoted an applicable portion of the *Jones & Laughlin* opinion. Respondent on page 9 of his

answer quotes the same portion of the *Jones & Laughlin* opinion but adds the next following sentence of that opinion to the effect that the power of Congress over interstate commerce may not be extended "so as to embrace effects upon interstate commerce so indirect and remote that to embrace them in view of our complex society would effectually obliterate the distinction between what is a national and what is local and create a completely centralized government." On pages 15 and 16 of our petition we have cited four recent decisions of this Court, each of which is compelling authority for the proposition that the 1939 amendment is not beyond the scope of the powers of Congress.

In a half-hearted effort to sustain the proposition that the 1939 amendment has gone beyond the powers of Congress, respondent cites the cases of *Boston & Maine R. R.* v. *Armburg*, 285 U. S. 234, and *Industrial Accident Commission of the State of California* v. *Davis*, 259 U. S. 182. Neither of these cases is any authority for the contention that the 1939 amendment was beyond the powers of Congress.

The *Armburg* case holds that the terms of the Federal Employers' Liability Act previous to the 1939 amendment did not purport to apply to any accident sustained by an employee who was not at the time of accident doing interstate work. The case does not hold that Congress lacked the power to broaden the scope of the Federal Employers' Liability Act. Incidentally the case is good authority for the proposition that the burden is on one who assails a statute to establish its unconstitutionality. Respondent in the case at bar has utterly failed in this burden.

The *Davis* case likewise is based on the wording of the Federal Employers' Liability Act as it existed prior to the 1939 amendment. The court had no occasion to pass on the question here presented as to whether Congress could broaden the scope of the Act.

On page 4 of the answer, respondent charges that petitioner seeks to extend the operation of the Federal Act to the point where every employee of an interstate railroad would be subject to the Act. Petitioner makes no such claim, and seeks only to give effect to the language of the 1939 amendment whereby there is brought under the Act any employee of a carrier any part of whose duties in any way "directly or closely and substantially" affect interstate commerce. Obviously there are still a great many employees of an interstate carrier who have no duties which "directly or closely and substantially" affect interstate commerce and such employees would not be affected by the amendment.

The only other contention of respondent is that a determination of the question presented in this case will not "clarify for all time the application of the amendment to the Act" (answer p. 6) and that because a decision in this case cannot once and for all determine all possible questions which may later arise in other cases involving the Amendment, this case should not be reviewed by this Court. If this reasoning were correct it would apply to the Federal Employers' Liability Act itself and would have prevented this Court from having decided a single one of the many cases that have arisen in the past under the Federal Employers' Liability Act.

CONCLUSION.

We respectfully submit that the effect of the 1939 amendment of Section 1 of the Federal Employers' Liability Act should be authoritatively decided by this Court, and that therefore the petition for writ of certiorari should be granted.

Respectfully submitted,

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